



Federal Transit Administration

Equitable Economic Recovery and Workforce Development Through Construction Hiring Pilot Program

AGENCY: Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The Federal Transit Administration (FTA) is announcing an initiative to permit FTA recipients and subrecipients to utilize geographic, economic, or other hiring preferences on FTA-funded construction projects. This initiative will be carried out as a pilot program for a period of four years (unless extended) under authority provided in the Consolidated Appropriations Act, 2021, the Federal grants management regulation, and a recent Office of Management and Budget Memorandum (March 19, 2021). The purpose of this pilot program is to provide flexibility to utilize hiring preferences to promote equitable creation of employment opportunities and workforce development activities, particularly for economically or socially disadvantaged workers, while evaluating the impact of such preferences on full and open competition and project delivery.

DATES: This pilot program is effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. This pilot program will end [INSERT DATE FOUR YEARS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*], unless it is extended.

FOR FURTHER INFORMATION CONTACT: Dana Nifosi, Deputy Chief Counsel, Federal Transit Administration, 1200 New Jersey Ave. SE., Washington, DC 20590, 202–366–4011.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may also be downloaded from the Office of the Federal Register’s Website at www.FederalRegister.gov and the Government Publishing Office’s Website at www.GovInfo.gov.

Background

FTA advances the mission of improving public transportation for America's communities, in part, by providing funding for the construction of public transportation facilities and the training and development of the public transportation workforce. These activities provide opportunities and access to construction careers, including for disadvantaged and under-represented individuals.

Today, FTA is announcing a new initiative, which will be conducted as a pilot program, to permit FTA recipients and subrecipients to utilize geographic, economic, or other hiring preferences on FTA-funded construction projects. This initiative implements a provision in the Consolidated Appropriations Act, 2021 (Pub. L. 116-260, Dec. 27, 2020, 134 Stat 1182), which has been included in prior Appropriations Acts since Fiscal Year (FY) 2016, that authorizes the Secretary to permit States and local governments to implement geographic, economic, or other hiring preferences not otherwise authorized by law, subject to certain mandatory certifications that the recipient must make. Through this pilot program, FTA also will exercise flexibility recently granted to Federal agencies by the Office of Management and Budget (OMB) to support recipients and subrecipients in achieving equitable economic recovery from the COVID-19 public health emergency. Additionally, the pilot program advances Executive Order (E.O.) 13985, "Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," issued on January 20, 2021, by supporting workers in overcoming barriers to obtaining successful, long term careers in the transit construction industry.

Job Opportunity, Equity, and Workforce Development

FTA supports equity in workforce development through several programs pursuant to 49 U.S.C. 5314(b). It funds human resource and training activities, including outreach programs to increase employment for veterans, women, individuals with disabilities, and minorities in public transportation activities. FTA also administers the competitive Innovative Public Transportation

Frontline Workforce Development Program, which requires programs eligible for funding to undertake mandatory activities, including development of apprenticeships, on-the-job training, and instructional training; building partnerships with local public transportation operators, unions, workforce development boards, and State workforce agencies to identify workforce skill gaps; and addressing current and projected workforce shortages by developing partnerships with high schools, community colleges, and other community organizations. Notwithstanding such workforce training and development activities, barriers to employment in the transit construction industry remain, particularly for underserved communities.

General Prohibition on Exclusionary or Discriminatory Preferences in Contracting

In general, Federal law prohibits recipients and subrecipients of Federal funds, including under Chapter 53 of Title 49 of the United States Code, from using certain contracting provisions that do not directly relate to the bidder's performance of work in a competent and responsible manner. Specifically, 49 U.S.C. 5325(a) and 5323(h)(3), respectively, require FTA recipients to conduct all federally funded procurements in a manner that provides full and open competition as determined by the Secretary, and prohibit FTA grant funds from being used to support a procurement that uses an exclusionary or discriminatory specification. These provisions are similar to 23 U.S.C. 112(a), which requires FHWA to ensure that plans, specifications, and methods of bidding for highway construction undertaken or overseen by state transportation department must be effective in securing competition.

In addition, the Federal grants management regulation, 2 CFR 200.319, prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Examples of such provisions include local and other geographic-based labor hiring preferences.

Interpretation of Competition Mandate

DOT historically has prohibited recipients and subrecipients from using certain contracting provisions that do not directly relate to the bidder's performance of work in a competent and responsible manner, due to concern that such provisions unduly restrict competition. In August 2013, at DOT's request, the Department of Justice, Office of Legal Counsel (OLC) issued a memorandum opinion interpreting 23 U.S.C. 112 (Section 112). *See Competitive Bidding Requirements Under the Federal-Aid Highway Program*, 37 Op. OLC 33 (2013) (2013 OLC opinion). The 2013 OLC opinion is available at <http://www.justice.gov/olc/opinions>. The 2013 OLC opinion clarified that Section 112, which as discussed above, is analogous to 49 U.S.C. 5325(a), does not compel DOT's historic position with respect to contracting requirements that do not directly relate to the bidder's performance of work. Rather OLC concluded that Section 112 provides the Secretary with discretion to permit other types of State or local requirements if they do not "unduly limit competition." OLC explained that FHWA may reasonably determine that a State or local contracting provision does not unduly limit competition under Section 112 even if it may have the incidental effect of reducing the number of eligible bidders if it imposes reasonable requirements related to performance of the necessary work. 2013 OLC opinion, at 35.

Thus, DOT has discretion under 23 U.S.C. 112—and by extension 49 U.S.C. 5325(a)—to evaluate whether a State or local law or policy is compatible with the competitive bidding requirements of these statutes. The process used to evaluate whether State and local requirements satisfy statutory competition requirements is a matter of agency discretion. 2013 OLC opinion, at 54.

Prior DOT Contracting Initiative Pilot Program

On March 6, 2015, DOT announced in the Federal Register (80 FR 12257) an initiative to permit, on an experimental basis, FHWA and FTA recipients and subrecipients to utilize various contracting requirements that generally have been disallowed due to concerns about adverse impacts on competition. This initiative was carried out as a pilot program, the purpose of which

was to evaluate whether local or other geographic labor hiring preferences, economic-based labor hiring preferences (*i.e.*, low-income workers), and labor hiring preferences for veterans unduly limit competition. For FTA, this pilot program applied to rolling stock procurements as well as contracting for construction projects.

DOT extended the pilot program on March 17, 2016 (81 FR 14524) and January 18, 2017 (82 FR 5645). With the extension notices, DOT also amended the pilot program by adding certifications from participants, as required in the FY 2016 and FY 2017 DOT Appropriations Acts, *see* Pub. L. 114-113, Dec. 18, 2015, 129 Stat 2242, at Sec. 192; and Pub. L. 115-31, May 5, 2017, 131 Stat 135, at Sec. 191.

On October 6, 2017, DOT published a notice in the Federal Register (2017 Notice) rescinding the pilot program, and announced the withdrawal of a related Notice of Proposed Rulemaking published on March 6, 2015 (80 FR 12092).

FTA received only one application under this pilot program, from the Los Angeles County Metropolitan Transportation Authority, for four rolling stock procurements. FTA granted that application with modifications. FTA received no applications with respect to construction projects because the DOT Appropriations Acts for FY 2015 and FY 2016 included a provision prohibiting FTA from enforcing the Federal regulatory prohibition on geographical preferences in procurements for construction hiring. *See* Pub. L. 113-235, Dec. 16, 2014, 128 Stat 2130, at Sec. 418; Pub. L. 114-113, Dec. 18, 2015, 129 Stat 2242, at Sec. 415. Thus, FTA recipients could utilize geographic preferences for construction hiring without obtaining FTA approval.

Current Pilot Program

I. Legal Authority

The initiative set forth in this notice is authorized under Section 199B of the Consolidated Appropriations Act, 2021 (Pub. L. 116-260, Dec. 27, 2020, 134 Stat 1182), 2 CFR 200.319, and Office and Management Budget Memorandum, “Promoting Public Trust in the Federal

Government through Effective Implementation of the American Rescue Plan Act and Stewardship of the Taxpayer Resources” (March 19, 2021) (OMB Memorandum) at https://www.whitehouse.gov/wp-content/uploads/2021/03/M_21_20.pdf. Section 199B authorizes DOT-assisted contracts under titles 49 and 23 of the United States Code to use geographic, economic, or any other hiring preference not otherwise authorized by law only if the grant recipient certifies the following:

(1) that except with respect to apprentices or trainees, a pool of readily available but unemployed individuals possessing the knowledge, skill, and ability to perform the work that the contract requires resides in the jurisdiction;

(2) that the grant recipient will include appropriate provisions in its bid document ensuring that the contractor does not displace any of its existing employees in order to satisfy such hiring preference; and

(3) that any increase in the cost of labor, training, or delays resulting from the use of such hiring preference does not delay or displace any transportation project in the applicable Statewide Transportation Improvement Program or Transportation Improvement Program. FTA’s Annual Certifications and Assurances for FY 2021 include a provision that requires a recipient to make these required certifications if it will request that FTA approve the use of geographic, economic, or any other hiring preference not otherwise authorized by law on any contract or construction project to be assisted with an award from FTA. *See* FY2021 Annual Certifications and Assurances for FTA Grants and Cooperative Agreements, Category 19, at <https://www.transit.dot.gov/sites/fta.dot.gov/files/2021-01/FY21-certifications.pdf>

By “expressly ... encourag[ing] geographic preference,” Section 199B authorizes FTA to utilize geographic, economic, or any other hiring preference on FTA-assisted construction projects, despite the general Federal regulatory prohibition of the use of geographical preferences in the evaluation of bids or proposals. *See* 2 CFR 200.319 (regulatory prohibition does not apply “where applicable Federal statutes expressly mandate or encourage geographic preference”).

Similarly, FTA would not consider a hiring preference that complies with Section 199B, and therefore, is permissible under 2 CFR 200.319, to be “an exclusionary or discriminatory specification” prohibited under 49 U.S.C. 5323(h)(3). In addition, the OMB Memorandum, which is aimed at providing administrative relief to recipients, allows Federal awarding agencies to grant certain exceptions to recipients affected by the pandemic, as those agencies deem appropriate and to the extent permitted by law. The memorandum states that these exceptions apply not only to recipients with COVID-19 related Federal financial assistance awards, but also to recipients with assistance awards unrelated to COVID-19. In Section VII of Appendix 3 to the memorandum, “Exemption of certain procurement requirements”, OMB specifically allows awarding agencies to waive the procurement requirements contained in 2 CFR 200.319(b) regarding geographical preferences, so long as awarding agencies require recipients to maintain appropriate records and documentation to support the charges against the Federal awards.

Pursuant to these authorities, FTA is establishing this pilot program to monitor and evaluate recipients and subrecipients of FTA financial assistance that utilize geographic, economic, or any other preference for construction hiring that traditionally has been prohibited on the basis that such preference would restrict competition. Under this pilot program, FTA will consider hiring preferences only in relation to construction contracts. It will not consider hiring preferences for rolling stock procurements.

II. Objective

FTA’s objective is to permit recipients and subrecipients of FTA financial assistance to utilize geographic, economic, or other hiring preferences for construction contracts that will contribute to equitable economic recovery from the COVID-19 pandemic and create employment opportunities and promote workforce development on transit construction projects, particularly for economically or socially disadvantaged workers who may otherwise have significant barriers to entry to the transit construction industry. Through receipt of post-contract award reports from participants, described below, FTA will monitor and evaluate the extent to

which approved hiring preferences result in equitable construction hiring and positively impact workforce development for disadvantaged workers. FTA also will assess what impact the preferences have on competition and project delivery.

Examples of hiring preferences that FTA will consider under this pilot program include local or other geographic labor hiring preferences, economic-based labor hiring preferences (e.g., for low-income workers or economically disadvantaged communities), and other labor hiring preferences. The Appropriations Act certifications discussed above preclude FTA from approving proposals with requirements that would cause a contractor to displace its existing employees to satisfy the local contracting requirements.

FTA will not approve proposals to alter the requirements of a state's approved Disadvantaged Business Enterprise (DBE) program or in any way require DBE firms to have any specific geographic location. Additionally, we note that even though hiring preferences may be utilized under this pilot program, State and local contracting agencies are responsible for ensuring that the establishment and implementation of their hiring preference are otherwise consistent with applicable Federal, State, and local laws.

III. Duration

FTA plans to carry out this pilot program for a period of four years from the date of publication of this notice. FTA will consider proposals relating only to procurements that will be advertised during this time frame. FTA may extend or terminate the pilot program at its discretion after public notice.

IV. Participation in Pilot Program

Recipients and subrecipients that intend to utilize geographic labor hiring preferences, economic-based labor hiring preferences, and other labor hiring preferences for construction contracts must receive approval from their FTA Regional Office prior to advertising contracts that include specifications with such preferences. Interested recipients and subrecipients must submit to their FTA Regional Office an application that addresses certain project specific factors

that will help FTA evaluate the use of the particular hiring preference for the proposed project.

These factors include, but are not limited to:

(1) Description of the construction project, including the type of transit facility that will be constructed, the estimated schedule for completion, the estimated total project cost, and the Federal share of funding.

(2) Description of the construction contracting opportunity, including the procurement method to be utilized and procurement schedule through contract award, the anticipated number and types of jobs that will be created by the contracting opportunity, and whether apprenticeships, including registered apprenticeships, and/or on-the-job training will be associated with the contracting opportunity.

(3) Description of the hiring preference proposed for the construction contracting opportunity. For example, is the hiring preference an incentive or mandatory? Does it apply to all labor on the project, or only to new hires? Will it apply to subcontractors?

(4) Description of the employment opportunities and impacts on workforce development the hiring preferences are anticipated to have, and how the recipient will evaluate the actual impact the approved hiring preferences have on equitable construction hiring and workforce development, particularly for disadvantaged workers. Include one or more numeric goals of success, and describe what data will be collected to measure performance in achieving the goal(s).

(5) Description of how the applicant will evaluate the effects of relevant contracting requirements on competition and project delivery. In doing so, the evaluation should include, at a minimum, comparisons of bids and unit prices received for the projects utilizing the relevant contract requirements to other projects of similar size and scope and in the same geographic area that do not utilize such requirements. If a reduction in the pool of bidders or an increase in unit prices is evident, explain the potential offsetting benefits resulting from the use of the requirement.

(6) Description and quantification of how the hiring preferences would promote the efficient and effective use of Federal funds in connection with the particular contract, when considered over the long term for the recipient or subrecipient's program, or by serving to protect the integrity of the competitive bidding process.

(7) Description of how the applicant will evaluate the effects of relevant contracting requirements on participation by DBE contractors and subcontractors (for example, evaluating whether DBE project goals were attained and whether the requirements acted as a barrier to DBE firms based on the composition of DBE firms' workforce).

(8) Description of whether the proposed contracting requirement has been the subject of litigation or whether litigation surrounding the use of the requirement has been threatened.

(9) Certify that the proposed contracting requirement complies with all applicable state and local laws.

(10) Provide the required certifications from Section 199B of the Consolidated Appropriations Act, 2021, Pub. L. 116-260.

Within fifteen business days of receipt of an application, FTA will conduct a preliminary review and advise the applicant regarding whether the application is complete or if additional information must be submitted. Within thirty days of receipt of a complete application, FTA will inform the applicant in writing whether the application is approved, approved with modifications, or denied. FTA approval will include reporting requirements, as addressed in Section V below.

V. Report Following Contract Award

No later than 120 days after contract award, unless an extension is granted in writing by the applicable FTA Regional Office, the recipient or subrecipient must submit to the FTA Regional Office a report that evaluates the effects of the approved contracting requirement on competitive bidding and project delivery. This report should, at a minimum: (1) Provide comparisons of bids received for the projects utilizing the relevant contract requirements to other

projects of similar size and scope and in the same geographic area that are not utilizing such requirements; (2) If a reduction in the pool of bidders was evident, explain the potential offsetting benefits resulting from the use of the requirement; (3) Describe how the approved contracting requirement lead to an increase in the effectiveness and efficiency of Federal funds for the project; and (4) Describe and quantify how the approved contracting requirement promoted the efficient and effective use of Federal funds in connection with the contract, when considered over the long term for the recipient or subrecipient's program, or by serving to protect the integrity of the competitive bidding process.

The recipient or subrecipient also must submit to the FTA Regional Office a report that evaluates the effects of the approved contracting requirement on job creation, equitable hiring, and workforce development. This report should, at a minimum: (1) Quantify total number of jobs created, by job category; (2) Summarize general statistics regarding where workers reside, including how many workers reside within same county as project; (3) Evaluate the actual impact the approved contracting requirement had on equitable construction hiring and workforce development, particularly for economically or socially disadvantaged workers; and (4) Evaluate the effects of relevant contracting requirements on participation by DBE contractors and subcontractors (for example, evaluating whether DBE project goals were attained and whether the requirements acted as a barrier to DBE firms based on the composition of DBE firms' workforce). Prior to approving the application, FTA will consult with the recipient or subrecipient to establish the deadline for this report, based on the size and complexity of the project. FTA will include the deadline for this report in the written approval. In general, the report will be due no later than three years after issuance of the Notice to Proceed for the contract, unless the recipient or subrecipient demonstrates that relevant data necessary for the required evaluations will not be available within the three-year timeframe.

A review committee comprised of FTA staff will evaluate the reports and reserves the right to seek clarification from any recipient about any statement that is made in a report. FTA

also may request additional documentation or information to be considered during the review process. FTA or DOT may use information received from pilot program participants through these reports to support future regulatory changes, guidance and/or policies relating to utilization of hiring preferences in contracting.

AUTHORITY: Section 199B of the Consolidated Appropriation Act, 2021; 2 CFR 200.319.

Nuria I. Fernandez,
Deputy Administrator.

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